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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 440

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

LOUIS HOLLAND, DEPUTY COMMISSIONER OF LABOR, AND [illegible], RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 456

GULF STEVEDORE CORPORATION AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, PETITIONERS

v.

LEE H. HOLLIS, DEPUTY COMMISSIONER OF LABOR, AND GABELUS PICARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a–20a) is unreported; the opinion of the district court (Pet. App. 7a–16a) is reported at 298 F. Supp. 426.

JURISDICTION

The judgment of the court of appeals was entered May 5, 1970. The petition for a writ of certiorari was filed on July 27, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the effect of use of prosthetic devices should be taken into account in determining whether there has been loss of use of a bodily member under the schedule disability sections of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 908(c)(1)–(19).

STATUTORY PROVISIONS

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*, provides in pertinent part:

> § 907. Medical services and supplies.
>
> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.
>
> (b) * * * The deputy commissioner shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished and shall have authority to order a change of physicians or hospitals when in his judgment such change is desirable or necessary.
>
> * * * * *
>
> (d) If the employer fails to provide the medical or other treatment, services, and supplies required to be furnished by subsection (a) of this section, after request by the injured employee, * * * such injured employee may procure such medical or other treatment, services, and supplies and select a physician to render

treatment and services at the expense of the employer. * * * The deputy commissioner may, * * * upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. * * *

§ 908. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

* * * * *

(5) Eye lost, one hundred and sixty weeks' compensation.

* * * * *

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 percent or more of the vision of an eye shall be the same as for loss of the eye.

* * * * *

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another em-

ployment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

STATEMENT

Gabelus Picard sustained an injury to his right eye while employed by Gulf Stevedore Corp. as a longshoreman aboard a vessel moored in the navigable waters of the Houston Ship Channel. The lens of the eye had to be surgically removed, resulting in a 95 per cent uncorrected permanent visual loss. A deputy commissioner of labor ruled that Picard was entitled under the Act to the schedule award of 160 weeks compensation for the physical loss of over 80 per cent of the vision of an eye. 33 U.S.C. 908 (c)(5), (16). In addition to this award, the deputy commissioner awarded Picard benefits, not contested by petitioners, for temporary total disability (33 U.S.C. 908(b)), from September 22, 1964 to November 19, 1964, and from December 11, 1964 to February 11, 1968, less 140 3/7 weeks for time actually worked, and for temporary partial disability (33 U.S.C. 908(e)) from November 20, 1964 to December 10, 1964 (Pet. App. 6a).

Gulf Stevedore Corp., and the Texas Employers' Insurance Association, the compensation insurer, brought an action in the district court seeking reversal of the 160 weeks' compensation award for loss of vision in the right eye on the ground that the deputy commissioner should have considered the effect of use of a prosthesis (a cataract lens) in determining the degree to which Picard had lost the use of that eye.

Both the district court and the court of appeals rejected that argument and held that a claimant's uncorrected vision is the proper standard to be applied in determining the percentage loss of vision for an award under 33 U.S.C. 908(c) (5), (16).

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, provides two separate types of compensation awards for permanent partial disability. 33 U.S.C. 908(c) (1) through (19) provide schedule awards for permanent partial disability resulting from physical loss or loss of use of a bodily member. Section 908(c) (1)–(19) establishes a schedule of awards, the amounts of which are fixed by Congress at a certain number of weeks compensation without regard to economic loss. Section 908(c)(21) provides for calculation of awards for permanent partial disability in all other cases on the basis of the claimant's actual economic loss of earning power.

The deputy commissioner and the courts below applied this distinction when they considered only uncorrected visual loss in determining that the claimant was entitled to a schedule award for loss of more than 80 per cent of the vision of his right eye. The district court, whose reasoning was adopted by the court of appeals, specifically held:

> If lost earning capacity is the only focus of the Act, corrective lenses should be considered, for their use is likely to enhance the claimant's earning capacity. Under a scheduled

> loss, however, there is a fixed measure of compensation. The award is not governed by earning capacity * * * Thus, in effect, the claimant is being compensated for loss of the body member, not lost earning capacity. From this perspective, a consideration of corrective lenses would seem to be irrelevant. [Pet. App. 13a.]

By refusing to take into account the fact that the claimant's loss of earning capacity would be lessened by the use of corrective lenses, the deputy commissioner and both courts below followed the majority rule of "no reduction" for prosthetic devices. 2 Larson, *Workmen's Compensation* § 58.10. A number of decisions have applied this rule in cases where a cataract or similar injury left the employee with greater than 80 per cent loss of industrial vision in one eye which could be partly restored with a prosthetic device. *E.g.*, *Lindsay* v. *Glennie Industries, Inc.*, 379 Mich. 573, 153 N.W. 2d 642; *Pargas Co.* v. *Hagan*, 428 S.W. 2d 779; *Western Contracting Corp.* v. *Industrial Comm'n*, 15 Utah 2d 208, 390 P. 2d 125; *Great American Indemnity Co.* v. *Industrial Comm'n*, 114 Colo. 91, 162 P. 2d 413; *Otoe Food Products Co.* v. *Cruickshank*, 141 Neb. 298, 3 N.W. 2d 452; *McCullough* v. *Southwestern Bell Tel. Co.*, 155 Kan. 629, 127 P. 2d 467; *Livingston* v. *St. Paul Hydraulic Hoist Co.*, 203 Minn. 62, 279 N.W. 829; *Pocahontas Fuel Co.* v. *Workmen's Comp. Appeal Bd.*, 118 W. Va. 565, 191 S.E. 49; *Marland Refining Co.* v. *Colbaugh* 110 Okla. 238, 238 Pac. 831. Except for the New York cases cited by petitioner, which represent the minority view, partially restored loss of vision has been considered only in cases in-

volving permanent total disability or non-schedule permanent partial disability where actual loss of earning power is at issue. *E.g., Foster* v. *Schmahl*, 197 Minn. 602, 268 N.W. 631; *Owen* v. *Chesapeake Corp.*, 198 Va. 440, 94 S.E. 2d 462; *Kelley* v. *Prouty*, 54 Idaho, 225, 30 P. 2d 769; *Graf* v. *National Steel Products Co.*, 225 Mo. App. 702, 38 S.W. 2d 518, *Alessandro Petrillo Co.* v. *Marioni*, 33 Del 99, 131 A. 164.

In support of their position that the effect of corrective lenses should be considered by the deputy commissioner in schedule as well as non-schedule awards, the petitioners rely principally upon a 1935 decision, *Washington Terminal Co.* v. *Hoage*, 79 F. 2d 158 (C.A.D.C.). The holding in that case that the effect of corrective lenses must be taken into account in determining schedule awards under 33 U.S.C. 908(c)(5), was premised on the belief that schedule awards were intended only to compensate for loss of earning power. 79 F. 2d 161. As we have shown, the majority "no reduction" rule which subsequently has developed recognizes that schedule awards are designed to compensate for loss of the bodily member, *not* for loss of earning power. Whether the Court of Appeals for the District of Columbia, contrary to the majority view, would apply today the same rationale it followed 35 years ago is not known. In the event the issue were again presented to it and it chose to follow its earlier decision, the resulting conflict might warrant review by this Court. At the present time, however, there is no occasion for this Court to consider the matter.

Petitioners assert finally that it is unfair to require the employer to provide both corrective medical treatment and compensation for loss of use of a member, and that the decision below ultimately will deprive claimants of corrective medical benefits and thus undermine the purpose of the Act. They contend that once a permanent partial disability award is made, the process of recovery under Section 907(a) is completed and the employer's obligation to provide medical treatment terminates. If corrective treatment will not ultimately benefit the employer by reducing the amount of the award, they argue, the employer will be reluctant to provide such treatment (Pet. 6).

Their argument ignores the requirement that an employer furnish medical service and supplies not only for the period until recovery is completed but also to the extent that the nature of the injury may require. Thus, the finding that an employee has achieved maximum improvement does not itself relieve the employer of the duty to furnish medical services and supplies. 33 U.S.C. 907(a). If an employer fails to provide such treatment, either before or after maximum recovery is achieved, the employee may obtain necessary treatment himself and the deputy commissioner may make an award for the reasonable value thereof. 33 U.S.C. 907(d). Moreover, the deputy commissioner may at any time determine the necessity, character, and sufficiency of medical treatment being furnished by the employer and order whatever changes he finds necessary or desirable. 33 U.S.C. 907(b). Thus, the decision below will not deprive any claimant of adequate corrective treatment.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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